85-1012

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEAT, MARWICK, MITCHELL & CO.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. May members of a bona fide partnership who possess the characteristic indicia of partners nevertheless be treated as "employees" of the partnership under federal employment laws (here, the Age Discrimination in Employment Act) merely because the number of partners is large and their respective partnership percentages are therefore small?

2. May a court properly equate individuals and partnerships with corporations when determining whether a broad subpoena calling for highly confidential information concerning relationships among partners and their personal financial information satisfies applicable constitutional and statutory requirements?

3. Where an agency's jurisdiction is limited to the relationship between employers and "employees," may a court, when asked to enforce an agency subpoena that demands "all writings or [sic] any kind which describe, explain, relate to, or in any way bear upon the relationship of" partners to the partnership and the relationship of partners vis-a-vis partners, accept as dispositive the agency's unprecedented legal position that partners of a large, concededly bona fide, partnership may generally be regarded as "employees" of the partnership?

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No.

IN THE

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PEAT, MARWICK, MITCHELL & CO.,
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vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Peat, Marwick, Mitchell & Co., a partnership engaged in the practice of accountancy, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the district court's enforcement of an Equal Employment Opportunity Commission subpoena.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (John Gibson, J., *dissenting*) is reported at 775 F.2d 928 (8th Cir. 1985) and is reprinted in the Appendix (App. A-1). The memorandum and order of the United States District Court for the Eastern District of Missouri, Eastern Division, is reported at 589 F.Supp. 534 (E.D. Mo. 1984) and is reprinted in the Appendix (App. A-11).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on October 10, 1985.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 81 Stat. 602, 29 U.S.C. § 621 *et seq.*, is set out in full in the Appendix (App. A-24). It provides in pertinent part:

> § 623(a). It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges *of employment*, because of such individual's age (emphasis added)...
>
> § 626(a). The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate *for the administration of this chapter* in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (emphasis added).
>
> § 630. For the purposes of this act —
>
> (f) The term "employee" means an individual *employed by* any employer... (emphasis added).

Also involved are Sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended ("FLSA"), 52 Stat. 1065, 29 U.S.C. §§ 209 and 211, incorporating Sections 9 and 10 of the Federal

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[1] On November 13, 1985, the court of appeals, over objection, stayed issuance of its mandate until December 13, 1985, to be further stayed pending disposition of this petition (App. A-10).

Trade Commission Act, as amended, 38 Stat. 722, 15 U.S.C. §§ 49 and 50. These provisions are set out in full in the Appendix (App. A-42, 44).

STATEMENT OF THE CASE

This case involves a self-initiated Equal Employment Opportunity Commission ("EEOC") investigation of Peat, Marwick, Mitchell & Co. ("PMM"), not based on any complaint (Rec. 8-13).[2] See 29 C.F.R. §1626.4 (1985). The ostensible purpose of the investigation is to determine whether, in the retirement policies to which they have agreed among themselves, the partners (members) of PMM discriminate against one another on the basis of age in violation of the ADEA, which prohibits specified age-based discrimination against "employees" of a partnership.[3]

The EEOC issued a subpoena *duces tecum* to one of the PMM partners, Thomas L. Holton, requiring him to produce for inspection and copying "all writings or [sic] any kind" since January 1, 1978, "which describe, explain, relate to, or in any way bear upon the relationship of members to the firm and members *vis-a-vis* members" (Rec. 13). Read literally, the subpoena calls for a vast array of documents generated by, for or about the PMM partners, including the highly confidential partnership agreement and other sensitive documents reflecting, for example, the status of the individual partners' capital and drawing accounts.

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[2] "Rec." refers to Clerk's Record filed in the court of appeals. "TT" refers to the transcript of the hearing before the district court.

[3] Authority to enforce the ADEA was initially vested in the Secretary of Labor, and was transferred to EEOC effective July 1, 1979. See Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Executive Order No. 12144, 44 Fed. Reg. 37193 (1979). This change was retroactively ratified in 98 Stat. 2705 (1984).

Mr. Holton and his partners objected to the subpoena on the ground, *inter alia*, that as partners they cannot be regarded as "employees" covered by the ADEA (Rec. 24-27) and therefore the subpoena could not be for a legitimate purpose. They provided evidence that they were indeed a bona fide partnership and they offered to produce the partnership agreement under appropriate safeguards (Rec. 28-30). Insisting on the right to copy the agreement and to disseminate it within the agency, the EEOC refused the offer and applied to the United States District Court for the Eastern District of Missouri to enforce the subpoena (Rec. 5-7, 28-32).

The EEOC conceded that PMM was not a "sham" partnership (TT. 25). Its contention, rather, was that the partners are "employees" of the partnership under the ADEA because PMM has many partners, and hence each partner necessarily has a small percentage interest ("less than one percent of the assets of the partnership"), a fact that made the EEOC question whether any partner "has any real control over the partnership" (TT. 25).

The PMM partners opposed the EEOC's application by submitting an uncontroverted affidavit establishing that, while none has more than a one percent interest, they share all the commonly accepted attributes of a partnership relationship: each partner makes contributions to capital, shares profits and losses, votes on candidates for admission, signs the partnership agreement and votes on all amendments, and agrees to devote all his or her professional time and attention to the partnership. They also showed that the partnership agreement is a highly confidential document which defines all rights and obligations between and among the partners, and that PMM files partnership information tax returns and distributes K-1 forms to all of the partners (Rec. 19-32, 44).

The district court enforced the subpoena, holding that the investigation was for a "legitimate purpose because it is possible

that [PMM] may label some of its members as 'partners' when, in fact, those members may not fit within the traditional definition of the term" (App. A-19). The holding was thus grounded on a theory expressly disavowed by the EEOC, whose stated premise was not addressed. The district court, however, over objection, stayed enforcement pending appeal, because of the "complex" and "difficult" questions involved and because the documents called for "are highly confidential in nature" and their "disclosure could result in irreparable injury" to the partners (App. A-21-23).

On appeal, the Court of Appeals for the Eighth Circuit affirmed by divided decision. The majority held that the EEOC's investigation was for the legitimate purpose of "determin[ing] whether PMM's retirement practices and policies discriminate against individuals classified as employees for purposes of the ADEA" (App. A-4). The court did not address the evidence adduced by PMM nor the EEOC's concession that PMM was not a sham partnership, but accepted the EEOC's legal premise that it was free to proceed with the investigation under its quantitative legal theory.

Judge John Gibson dissented. He stated that the record established that PMM was a legitimate partnership. Therefore, the EEOC's investigatory attempt to obtain sensitive partnership and partners' documents was not for a legitimate purpose because "Congress did not intend that ADEA govern relationships among partners nor did it authorize the EEOC to investigate such relationships" (App. A-5).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

In concluding that the EEOC's subpoena was in aid of a lawful inquiry, the court of appeals endorsed an unprecedented interpretation of the ADEA by the agency.[5] That interpretation conflicts with the decisions of other courts of appeals concerning who constitutes an "employee" for purposes of federal employment statutes.[6]

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[5] It does not appear that in his contemporaneous implementation of the ADEA the Secretary of Labor ever took the position that members of a bona fide partnership may be treated as "employees" of the partnership for purposes of the ADEA. Shortly before authority to enforce the ADEA was transferred to the EEOC, a Department of Labor official provided an unpublished informal opinion stating (Rec. 45):

> The employment relation is not considered to exist between a bona fide partnership and the partners of whom it is composed. Such partners are self-employed, since they cannot be said to be employed by an employer separate and distinct from themselves.

However, the opinion added that "merely calling individuals who are essentially employees by the term 'partners' under a so-called partnership agreement, which fails to invest them with the usual attributes of partnership in an enterprise, does not make them such" (*id.*). Applying a novel, quantitative approach, the writer opined that a partner in a national accounting firm having less than a 1% interest where no partner has as much as a 10% interest "very likely would be considered an employee under the ADEA" (*id.*). Shortly after the transfer, an EEOC official stated in an unpublished informal opinion that the Labor Department official's opinion "reflects the views of this Commission on this matter" (Rec. 47). Endorsing that characterization, the EEOC relied on those informal staff opinions in seeking enforcement of the subpoena in this case.

[6] The ADEA defines "employee" as "an individual employed by an employer." 29 U.S.C. § 630(f). Essentially the same definition is used in other federal employment laws, including Title VII of the Civil Rights Act (42 U.S.C. § 2000e(f)) and the Employment Retirement Income Security Program (29 U.S.C. § 1002(6)).

The factual record underlying the court of appeals' decision — established by uncontradicted evidence — is that petitioner is a bona fide partnership whose members possess the traditional characteristics of partners. Under the common law and the Uniform Partnership Act (in effect in most states prior to enactment of the ADEA), there are no quantitative limits on the number of partners who may constitute a partnership nor the size of their respective percentage interests. The only justification for continuing this investigation is if it is possible to treat such partnership members as "employees" merely because their number is relatively large, and their individual percentage interests are therefore correspondingly small. That issue can and should be determined now as a matter of law without regard to particular circumstances. *See, e.g., FTC v. Miller,* 549 F.2d 452, 462 (7th Cir. 1977).

The court of appeals' refusal to reject the legal premise advanced by the EEOC conflicts with decisions in other circuits, where the courts have held that the identical provision of Title VII of the Civil Rights Act (see p. 6 n.6 *supra*) does not permit treating bona fide partners as employees. *Burke v. Friedman,* 556 F.2d 867, 869-70 (7th Cir. 1977); *Holland v. Ernst & Whinney,* 35 E.P.D. ¶ 34,653 (N.D. Ala. 1984); *see EEOC v. Dowd & Dowd, Ltd.,* 736 F.2d 1177 (7th Cir. 1984). *See also Hishon v. King & Spalding,* 467 U.S. 69, ____, 104 S.Ct. 2229, 2236 (1984) (Powell, J., concurring); *Zimmerman v. North Am. Signal Co.,* 704 F.2d 347, 352 (7th Cir. 1983) ("legislative history of the nearly identical definitional provisions of Title VII. . .militates against distorting traditional concepts of employment relationships" in defining "employee" under ADEA). The analysis in those decisions did not turn on the number of partners nor the size of their respective interests in the partnership.

If members of a bona fide partnership are to be treated as "employees" for purposes of the ADEA by reason of their number or the size of their percentage interests, an unprecedented and essentially arbitrary legislative judgment is re-

quired as to whether and where such a line should be drawn. Congress plainly did not make such an extraordinary judgment in enacting the ADEA.[7] Nor did it delegate any such function to the EEOC, which has no legislative standards by which it could reasonably make such a judgment,[8] thereby rechristening as "employees" members who have all the legal attributes of partners, have always regarded themselves as members of the partnership, and who are themselves responsible for setting their own retirement policies. As Judge Gibson stated: "This case presents the question of whether the EEOC has unlimited power to acquire all relevant records of a business entity that Congress did not place within the scope of the ADEA" (App. A-8). The Court should decide that question.

II.

At issue here is a challenge by members of a partnership to the validity of a subpoena that requires the production of confidential documents governing, describing or concerning the relations between and among partners and reflecting the most confidential personal financial information. In dismissing that challenge

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[7] Although Congress defined "employer" to include "partnerships," 29 U.S.C. §§ 630 (a), (b), it pointedly did not define "employee" to include "partners" or "members" of a partnership. 29 U.S.C. § 630 (f). It also restricted application of the Act to the terms and conditions "of employment," 29 U.S.C. § 623(a). "There is no evidence in the language of the statute or its legislative history that Congress perceived a need to protect partners from one another." (Gibson, J., dissenting, App. A-7.)

[8] Indeed, the standard created by the agency itself, while appearing to discriminate against large partnerships, can produce even more capricious results. For example, in a partnership with 49 partners where one has a 51% interest and the other 48 each has a 1.02% interest none would be an employee, whereas in a partnership of 101 partners having equal interests of .99% all would be employees. Such an arbitrary distinction is irrational. The EEOC's theory would also produce a headless horseman, a partnership in which there was no employer.

on the basis of case law concerning subpoenas to corporations, the court of appeals' decision conflicts with decisions of the Court holding that corporations do not have the same protection against burdensome and intrusive inquiries as individuals and partnerships. The procedures and standards to be applied to enforcement of compulsory process directed to individuals and partnerships are important in view of the large number of partnerships and the rights of privacy and association their individual members enjoy.

For three quarters of a century the Court's opinions have made clear that the decision to engage in commercial or other activity through a corporation, rather than as individuals or partners, has substantial consequences affecting the power of the government to compel the production of documents or information. *See, e.g., Wilson v. United States,* 221 U.S. 361, 382-85 (1911); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 197, 204-06, 208, 209-10 (1946); *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950); *California Bankers Ass'n v. Shultz,* 416 U.S. 21, 65 (1974); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 353 (1977). Thus, while they expose themselves to unlimited personal liability and other hazards, individuals and partnerships retain a significant measure of privacy that is forfeited when affairs are conducted through a corporation.

The court of appeals relied on the Court's decisions defining the proper role of a court in assessing the validity of compulsory process, such as *Oklahoma Press* and *Morton Salt*. But those cases have all involved corporations, a fact that the Court has emphasized. Because the court of appeals erroneously thought itself bound by the Court's decisions as to corporations, it did not consider whether different procedures would be required in assessing a burdensome and intrusive subpoena to members of a

partnership based on a claim of legal authority that is plainly deficient or, at best, highly dubious.[9]

For example, where the agency is contending that partnership members ordinarily beyond its jurisdiction are nevertheless "employees" in the face of a prima facie showing that the members are true partners and not "employees" of the partnership, a court properly sensitive to the substantial privacy concerns of individuals and partnerships might reasonably require the agency to offer some more palpable demonstration of a plausible claim of authority than that offered below, even if such a showing were not required of the agency in the first instance.[10]

In other instances where the status of an entity has a bearing on the scope of an agency's authority to regulate or investigate, the courts have recognized the propriety of assessing at the subpoena enforcement stage substantial claims that the entity is beyond the agency's authority. *FTC v. Miller,* 549 F.2d 452

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[9] The EEOC's present investigation is unlike the inquiry in a given case to determine whether, for example, a particular plant may be "in commerce," which may be a necessary threshold step for an agency to take in determining whether it has jurisdiction. Here the agency cannot properly proceed unless it has been authorized to treat bona fide partners as "employees." Additional investigation is not needed to determine whether, under the EEOC's novel interpretation, it is permissible to treat the partners of PMM as "employees," for it is undisputed that they all have less than a 1% interest. Thus, the legal question whether such partners may be treated as "employees" for purposes of ADEA investigations and enforcement can and should be answered at this stage.

[10] Such heightened sensitivity is particularly warranted with respect to agencies that claim, as the EEOC does in this case, a statutory right to investigate without any complaint or charge of violation and without any reason to believe that there is or may be a violation.

(7th Cir. 1977) (common carriers); *FTC v. Rockefeller,* 591 F.2d 182 (2d Cir. 1979); *FTC v. Winters Nat'l Bank & Trust Co.,* 601 F.2d 395 (6th Cir. 1979) (banks). For example, in *FTC v. Rockefeller,* bank holding companies were permitted to argue that limitations on the FTC's authority over banks precluded the subpoenas to the holding companies.

Similarly, when the recipient of compulsory process can claim that enforcement may affect the exercise of protected rights of speech, press, or association, courts properly take these interests into account in determining how and whether to sanction such process, and in assuring that the inquiry is not more intrusive or burdensome than necessary. *See, e.g., Federal Election Comm'n v. Committee to Re-elect Lyndon La Rouche,* 613 F.2d 849, 857 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980); *Jones v. Unknown Agents,* 613 F.2d 864, 874-75 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980); *Smith v. Nixon,* 606 F.2d 1183, 1189 (D.C. Cir. 1979), *cert. denied,* 453 U.S. 912 (1981); *cf. Zurcher v. Stanford Daily,* 436 U.S. 547, 564 (1978); *id.* at 570 (Powell, J., concurring).[11]

Partners possess First, Fourth, Fifth and Fourteenth Amendment rights, including the rights of association. *Hishon v. King & Spalding,* 467 U.S. 69, ____, n.4, 104 S.Ct. 2229, 2236, n.4 (1984) (Powell, J., concurring); *cf. NAACP v. Alabama,* 357

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[11] In analogous circumstances the Court has eschewed mechanical rules where they may prevent timely consideration and disposition of fundamental questions on which an immediate ruling is desirable. *Compare, e.g, Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1948) (collateral order doctrine of finality for appeals); *Schlagenhauf v. Holder,* 379 U.S. 104, 110-12 (1964) (mandamus); *Sosna v. Iowa,* 419 U.S. 393, 399-402 (1975) (mootness); *Abney v. United States,* 431 U.S. 658, 661-62 (1977) (immediate appeal of denial of claimed immunity from prosecution on double jeopardy grounds); *Helstoski v. Meanor,* 442 U.S. 500, 506-07 (1979) (immediate appeal of denial of claimed immunity from questioning under speech or debate clause).

U.S. 449 (1958). They are therefore entitled to be protected against "fishing expeditions," and in a subpoena enforcement proceeding, "some evidence of the materiality of the papers demanded must be produced." *F.T.C. v. American Tobacco Co.*, 264 U.S. 298, 305-306 (1924).[12] As pointed out above, the cases subsequent to *American Tobacco* have involved corporations and have specifically distinguished the situation where "the production of *partners'* business records" is sought. *Oklahoma Press*, 327 U.S. at 208 (emphasis added). Here, of course, the subpoena does *not* purport to seek "partners' business records" in the usual sense, but, instead, and even more intrusively, such private records as each partner's capital and income interests in the partnership, as well as the confidential partnership agreement. Accordingly, the simple question presented is this: are the courts foreclosed from distinguishing between corporations on the one hand and individuals and partnerships on the other when determining whether to sanction an agency's compulsory process to the latter. That important question warrants review.

III.

Whoever or whatever the respondent, the administrative agency must nonetheless show that the investigation "will be conducted pursuant to a legitimate purpose." *United States v. Powell*, 379 U.S. 48, 57 (1964). Whether such a showing has been made is a judicial, not an administrative, determination. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946); *United States v. Powell*, 379 U.S. at 58-59 (1964).

"The gist of the protection" against agency process "is the requirement...that the disclosure sought shall not be unreasonable." *Oklahoma Press*, 327 U.S. at 208. In assessing

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[12] *American Tobacco* involves the same subpoena enforcement statutes, 15 U.S.C. §§ 49 and 50, as are involved in this case by their incorporation into the ADEA under 29 U.S.C. § 626(a), § 209, and § 211.

reasonableness the courts must take into account not only the degree of the intrusion into private matters but the strength of the claim of protection against such intrusion and the force of the agency's claim of jurisdictional coverage. Attenuated theories for applying the law to persons presumptively beyond the agency's jurisdiction cannot support as intrusive or burdensome an inquiry as would investigation of persons plainly within that jurisdiction. Yet here the district court abdicated its duty to assess the validity of the agency's demonstrably deficient claim of authority.

As Judge Gibson observed below, *Oklahoma Press* "reflects a compromise between the public interests and the private interests 'of men to be free from officious intermeddling' " (App. A-9).[13] In *Oklahoma Press* and its progeny, through judicial deference to a plausible claim of coverage, the balance was markedly tipped in favor of the investigatory agency because the cases involved corporations, which could not invoke the constitutional protection of privacy interests of individuals and partnerships. Here, there was a clear joinder of issue on the legitimacy of the investigation of a bona fide partnership, yet in the face of uniformly contrary case law the courts below essentially deferred to an unprecedented and presumptively implausible claim of authority.

Protection of individuals against intrusive and burdensome agency inquiries is a judicial function which, under our constitutional scheme, cannot properly be exercised by an administrative agency, either by delegation or by default. Whether the type of judicial abnegation demonstrated in this case is permissible is a matter warranting review.

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[13] "Officious examination can be expensive, so much that it eats up men's substance. It can be time consuming, clogging the process of business." *Oklahoma Press,* 327 U.S. at 213.

CONCLUSION

As Judge Gibson noted, the decision below has "broad consequences and implicates serious concerns," affecting "thousands" of partnerships in accounting, law and other areas of activity (App. A-9). For example, retirement plans are common in partnerships, and many include mandatory retirement.[14] Moreover, the EEOC's legal theory would apply not only to retirement policies under the ADEA, but to other aspects of the relationships among partners under other employment laws.

For each of the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[14] One post-ADEA survey of law firms showed that more than 80% of the firms responding had formal plans for retirement of partners, of which nearly 70% included mandatory retirement, and more than 60% of those set the age between 65 and 70. Kinsbery, *Law Firm Retirement Policies and Benefit Plans,* 60 A.B.A.J. 88 (1974). (In general, the ADEA bars mandatory retirement of "employees" at ages below 70). Changes in the tax laws since the survey make it likely that formal plans are even more prevalent today.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1869

Equal Employment Opportunity
Commission,
Appellee,

v.

Peat, Marwick, Mitchell
and Company,
Appellant.

Appeal from the United
States District Court
for the Eastern District
of Missouri.

Submitted: January 18, 1985

Filed: October 10, 1985

Before LAY, Chief Judge, and John R. GIBSON and FAGG, Circuit Judges.

FAGG, Circuit Judge.

Peat, Marwick, Mitchell & Co. (PM) appeals from an order of the district court requiring it to produce documents subpoenaed by the Equal Employment Opportunity Commission (EEOC). We affirm.

In May of 1982, the EEOC began investigating the retirement practices and policies of PM in an effort to determine whether the practices and policies are violative of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* In accordance with the investigatory powers granted it under section 7(a) of the ADEA, 29 U.S.C. § 626(a), the EEOC subpoenaed documents of PM bearing upon "the relationship of members to the firm and members vis-a-vis members" and documents relating to PM's retirement practices and policies.

After PM refused to comply with the subpoena, the EEOC initiated this enforcement proceeding in the district court. In response to the EEOC's application for an order to show cause why the subpoena should not be enforced, PM contended, among other things, that (1) the information sought by the EEOC is not relevant to any legitimate interests of the EEOC; (2) the EEOC's efforts to enforce the subpoena amount to an abuse of the court's process and are not in good faith; and (3) enforcement of the subpoena would violate various constitutional rights of PM and its members. The district court ordered enforcement of the subpoena and also granted PM's motion to stay enforcement of the order to produce pending this appeal.

PM's primary argument on appeal is that the subpoena should not be enforced because the EEOC's investigation is not for a legitimate purpose authorized by Congress. The ADEA prohibits discrimination by an employer against an employee or prospective employee on the basis of age. *See* 29 U.S.C. § 623(a). PM contends that its partners are not employees under the ADEA but rather they fall within the definition provided for employers in the Act, *see* 29 U.S.C. § 630(b). Thus, according to PM, the EEOC's investigation of the relationship of PM partners, as employers, to the firm and to each other and its investigation of the retirement practices and policies of the partnership is not for a legitimate purpose authorized by Congress.

The EEOC notes that "[a] determination of whether an individual is an employee and therefore covered by the protec-

tions in [the] ADEA should not center on the label which the organization has chosen to give to the position." *EEOC v. First Catholic Slovak Ladies Association,* 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied,* 104 S. Ct. 80 (1983). *See Zimmerman v. North American Signal Co.,* 704 F.2d 347, 352 and n.4 (7th Cir. 1983). EEOC maintains that it has subpoenaed the records of PM in an effort to determine whether individuals that PM classifies as "partners" fall within the definition of "employees" for purposes of the ADEA.

Congress has established the EEOC as the administrative body empowered to investigate violations of the ADEA and has given the EEOC supboena power in order to carry out its investigations. The authority to investigate violations includes the authority to investigate coverage under the statute. *Donovan v. Shaw,* 668 F.2d 985, 989 (8th Cir. 1982). It can no longer be disputed that "a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute." *Id.* at 989. *See Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 214 (1946); *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509 (1943); *EEOC v. Roadway Express, Inc.,* 750 F.2d 40, 42 (6th Cir. 1984); *EEOC v. Quick Shop Markets, Inc.,* 526 F.2d 802, 803 (8th Cir. 1975). The initial determination of the coverage question is left to the administrative agency seeking enforcement of the subpoena. *Oklahoma Press,* 327 U.S. at 214; *Endicott,* 317 U.S. at 509; *Donovan,* 668 F.2d at 989; *Quick Ship Markets, Inc.,* 526 F.2d at 803. Often a coverage question cannot be resolved until the administrative agency has had an opportunity to examine the subpoenaed records. *Endicott,* 317 U.S. at 508-09; *Donovan,* 668 F.2d at 989.

"The showing of reasonable cause required to support an application for enforcement of a subpoena duces tecum 'is satisfied . . . by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.' "

Donovan, 668 F.2d at 989 (quoting *Oklahoma Press,* 327 U.S. at 209). *See also United States v. Powell,* 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt Co.,* 338 U.S. 632, 652-53 (1950). The EEOC's investigation of PM is in an effort to determine whether PM's retirement practices and policies discriminate against individuals classified as employees for purposes of the ADEA. Thus, EEOC's investigation is for a legitimate purpose authorized by Congress. PM has not questioned the relevancy of the documents subpoenaed by the EEOC to a determination of this question.

PM also argues that the district court committed error in enforcing the subpoena because it is abusive, unreasonable, not in good faith, and violative of the constitutional rights of PM and its members. In this regard, PM argues that the EEOC has never made or attempted to make a showing that PM's partners may in fact be employees for purposes of the ADEA, or that it has reason to believe that PM's retirement practices and policies may be violative of the ADEA.

The EEOC is not required to make such a showing. As previously indicated, the EEOC must show that its investigation is for a legitimate purpose authorized by Congress and that the documents subpoenaed are relevant to its inquiry. *Oklahoma Press,* 327 U.S. at 209. If this demonstration is made, the EEOC is entitled to the documents subpoenaed unless PM demonstrates that judicial enforcement of the subpoena would amount to an abuse of the court's process. *Powell,* 379 U.S. at 57-58; *see United States v. Lask,* 703 F.2d 293, 297 (8th Cir.), *cert. denied,* 104 S. Ct. 104 (1983); *EEOC v. K-Mart Corp.,* 694 F.2d 1055, 1066 (6th Cir. 1982). PM has presented no evidence of bad faith or an abuse of the court's process by the EEOC.

PM also argues that ordering production of the documents violates its constitutional rights. We decline to address this issue as it was not ruled on by the district court.

We affirm.

JOHN R. GIBSON, Circuit Judge, dissenting.

I am troubled with what the court does today. I do not believe either the statute or precedent allows today's result. Nor do I think such a result was intended or anticipated by Congress. I therefore respectfully dissent.

Congress enacted the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, to prevent employers from discriminating against their employees on the basis of age. 29 U.S.C. § 623. Congress authorized the Equal Employment Opportunity Commission (EEOC) to enforce the ADEA. The definitional section of the statute reflects the limitations Congress intended to set on the scope of the application of the ADEA. "Employee" is defined in 29 U.S.C. § 630(f), with certain specific exceptions not relevant here, as "an individual employed by any employer." "Employer" is defined in 29 U.S.C. § 630(b) as a person engaged in an industry affecting commerce, and in turn, "person" is defined as including a partnership. Peat, Marwick, Mitchell & Co. (PM) is a partnership. The question before us is whether the EEOC is empowered to investigate relationships among members of a partnership, a "person" and hence an "employer" within the definitions under ADEA. Congress did not intend that ADEA govern relationships among partners nor did it authorize the EEOC to investigate such relationships.

The EEOC to the contrary contends that just because a business enterprise calls itself a partnership, and the participants in the enterprise call themselves partners, does not for purposes of the ADEA make it so. The EEOC perceives the issue as one of labels rather than legal relationships. The EEOC claims that only it has the authority to determine in the first instance whether the PM partners are partners for purposes of the ADEA. It has served the partnership with a subpoena duces tecum, requesting potentially sensitive partnership documents, to make this determination.

As the court today observes, it is settled that under *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946), the EEOC is authorized to make the initial determination as to who is covered within the definitions set out by the ADEA, and may subpoena documents for this purpose. This authority, however, has a significant limitation. Under *United States v. Powell,* 379 U.S. 48, 57 (1964), the EEOC "must show the investigation will be conducted pursuant to a legitimate purpose." PM is a partnership, an employer under the ADEA. I cannot agree that the EEOC investigation of the relationships among the PM partners is supported by a legitimate purpose.

The record before the district court makes clear that PM is a partnership. PM possesses the commonly accepted attributes of a partnership. Its partners make contributions to capital, share profits and losses, and vote on partnership matters. The partners must sign the partnership agreement and all partners must approve any amendments to the agreement. The entire partnership votes on candidates for admission. Partners must agree to devote all their professional time and attention to the partnership. The partnership files partnership information tax returns and distributes Form K-1 to its partners. The partnership does not enter into employment agreements with any of the partners. The record clearly distinguishes the role of the PM partners from that of their employees.[1] Most significantly, the EEOC made clear in open court that it was "not contending that PM is a sham partnership." (Tr. p. 25)

The EEOC seems to suggest that despite this record, and apparently simply because PM has a large number of partners, some partners may be something less than partners. It argues

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[1] Employees do not share profits, do not bear the risk of losses, and are not responsible for management of the firm's practice and offices. They may not sign the firm's name to a report or take part in the electoral process engaged in by the partners.

that in a firm of 1,375 partners,[2] it is debatable whether those with a minute equity interest, or physically or otherwise isolated from effective participation in the management or control of partnership affairs, are partners within the meaning of the ADEA's statutory exemption for employers. It seeks to assert that some members of PM may be labeled partners, but for ADEA purposes are not.

We deal here not with labels but with acknowledged legal relationships. The subpoena expressly calls for documents bearing upon "the relationship of members to the firm and members vis-a-vis members." The EEOC's argument based upon the statutory definition of "employee" and "employer," and its conclusion that "it doesn't follow that a member of a partnership can never be an employee," (Brief p. 14) clouds and confuses the definitions in the statute. Its analysis creates a case in which an individual might at the same time be both employer and employee. The entire thrust of the ADEA is to protect employees in their relationship with their employers. There is no evidence in the language of the statute or its legislative history that Congress perceived a need to protect partners from one another. Nowhere does the ADEA even suggest that the EEOC should play a role in the relationships among partners.

Justice Powell's concurring opinion in *Hishon v. King & Spalding*, 81 L. Ed. 2d 59, 69 (1984), which deals with Title VII, confirms this view. As Justice Powell's opinion makes clear, Congress did not intend to extend Title VII to the management of a law firm by its partners or to characterize the relationship among partners as an "employment" relationship to which Ti-

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[2] The shallow underpinnings of its position is best illustrated by a statement in the EEOC brief that PM may have 300 partners nationwide. (Brief p. 17 n. 13) PM readily admits and public information states that PM has some 1,375 partners. Such inaccuracy leaves me questioning how thoroughly the agency has considered its case.

tle VII would apply. *Id.* at 69-70.[3] Title VII contains definitions analogous to those in the ADEA. The EEOC's investigation of PM thus runs directly at odds with *Hishon*.

Certainly *Oklahoma Press* and *Powell* sustain the view that questions of coverage may be determined in the first instance by the agency. But in this case coverage is a settled question of law. Furthermore, even if it is argued that a factual inquiry is relevant, the unique record in this case establishes the existence of a legal relationship that has been established and has been admitted not to be a sham. Under these circumstances, *Powell* dictates that the investigation be brought to a halt as not pursuant to a legitimate purpose and that production of documents not be compelled.

A further serious issue exists as to the breadth of the EEOC's subpoena. The permissible breadth of a subpoena is subject to fourth amendment reasonableness requirements, *Oklahoma Press*, 327 U.S. at 209, which mandate that only those documents specifically relevant to the stated inquiry need be produced. Here the stated purpose of EEOC's subpoena is to determine whether PM is covered by the ADEA. Yet it seeks documents that go not merely to coverage but to substantive questions of whether there are possible violations. Among the PM documents subpoenaed by the EEOC are those relating to PM's retirement practices and policies for its partners. These documents have no reasonable relevance to whether PM's partners are subject to the proscriptions of the ADEA.

This case presents the question of whether the EEOC has unlimited power to acquire all relevant records of a business entity that Congress did not place within the scope of the ADEA.

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[3] Other courts have considered both partnership and professional corporations as outside the scope of Title VII. *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977); *EEOC v. Dowd & Dowd, Ltd.*, 34 Fair Emp. Prac. Cas. 1815 (BNA) (7th Cir. 1984). The EEOC attempts to distinguish these cases that involve small organizations. This overlooks the legal relationship which was the primary emphasis of the court in each of these cases.

PM is one among thousands of professional and business organizations employing the partnership form of legal structure. The court's decision today, therefore, has broad consequences and implicates serious concerns. The majority relies on *Oklahoma Press* without appreciating the careful balance the Supreme Court struck between the important public and private interests at stake. *Oklahoma Press* reflects a compromise between the public interests and the private interests "of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest." 327 U.S. at 213. As Justice Rutledge noted, "(o)fficious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business." *Id.*

We deal here with a partnership that admittedly is not a sham. If a partnership is in fact something other than that form of organization, different principles apply. A distinctly different situation was involved in *Oklahoma Press* and the cases on which it relied, where Congress's commerce clause power brought enormous numbers of firms within the scope of the Fair Labor Standards Act. I cannot sanction this result which permits the EEOC broad powers to compel the disclosure of information from partnerships outside the scope of its statutory authority.

Oklahoma Press and *Powell* underscore the concern with improper investigatory activity. Here the EEOC specifically directs its efforts toward a partnership. In so doing, the EEOC steps outside the bounds of its investigatory authority established in 29 U.S.C. § 626(a). I would reverse and order that the subpoena be quashed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1869-EM

Equal Employment Opportunity Commission,
Appellee,

vs.

Peat, Marwick, Mitchell and Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The motion of appellant for stay of mandate is granted, and the mandate of this Court is hereby stayed to and including December 13, 1985. If during that period there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that appellant has filed a petition for writ of certiorari in that Court, the stay shall continue until final disposition by the Supreme Court.

November 13, 1985

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2277 C (2)

Equal Employment Opportunity
Commission,
Applicant,

v.

Peat, Marwick, Mitchell and Co.,
Respondent.

ORDER

(Filed June 20, 1984)

In accordance with the Memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED that respondent be and is granted 10 days from the date of this Order in which to file a motion for an appropriate protective order concerning confidential documents; otherwise, respondent shall produce within 10 days of the date of this Order all documents requested in the subpoena issued to it by the Equal Employment Opportunity Commission.

Dated this 20th day of June, 1984.

/s/ Edward L. Filippine
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2277 C (2)

Equal Employment Opportunity
Commission,
Applicant,

v.

Peat, Marwick, Mitchell and Co.,
Respondent.

MEMORANDUM

(Filed June 20, 1984)

This matter is before the Court for a determination whether a subpoena *duces tecum* issued to respondent Peat, Marwick, Mitchell & Co. ("Peat, Marwick") should be enforced.

On application by Equal Employment Opportunity Commission ("EEOC"), this Court ordered respondent to show cause why it should not be compelled to comply with the subpoena issued to it. The Court held a hearing on the matter on April 13, 1984, and the parties have filed memoranda of law and exhibits in support of their positions.

After consideration of the evidentiary materials submitted by the parties, their briefs, and the applicable law, the Court hereby enters the following memorandum which it adopts as its findings of fact and conclusions of law in compliance with Rule 52(a) Fed.R.Civ.P.

This is an action for enforcement of a subpoena *duces tecum* pursuant to Section 7(a) of the Age Discrimination in Emplo*y*-

ment Act of 1967, as amended, 29 U.S.C. §621 ("ADEA"). Jurisdiction over this action is conferred upon the Court by the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914, as amended, 15 U.S.C. ¶49, 50; which provisions are incorporated in Sections 9 and 11 of the Fair Labor Standards Act, as amended, (29 U.S.C. §201 *et seq.*) ("FLSA") and in Section 7(a) of the ADEA, 29 U.S.C. §621 *et seq.*

Pursuant to Reorganization Plan No. 1 of 1978, applicant EEOC is a federal agency charged with administration and enforcement of the ADEA including, *inter alia,* the investigation of charges of unlawful employment practices.

Respondent Peat, Marwick is an accounting firm operating in the state of Missouri with facilities throughout the state and in the City of St. Louis. Respondent is an employer within the meaning of 29 U.S.C. §630(b).

On or about May 5, 1980, the EEOC initiated a directed investigation of respondent's retirement policies and practices to determine whether those policies and practices unlawfully discriminated against workers in the protected age group because of their age at its facilities in St. Louis, Missouri.

On June 29, 1982, applicant served notice of the age discrimination charge on respondent pursuant to 29 U.S.C. §626(d).

On April 20, 1983, in furtherance of the investigation of the charge, the District Director of applicant issued and caused to be served upon Thomas L. Holton a subpoena *duces tecum* requiring respondent to produce certain evidence on May 11, 1983. The subpoena was issued pursuant to Section 7(a) of the ADEA, 29 U.S.C. §621, which incorporates sections 9 and 11 of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* and the

Notice of Delegation of Subpoena which appeared in the Federal Register on June 29, 1979 (44 F.R. 37974).[1]

To date, respondent has failed to provide applicant with access to the evidence requested by the subpoena.

Respondent sets forth two reasons why the subpoena should not be enforced. First, respondent asserts that the EEOC has no authority to investigate, enforce, file suit, issue subpoenas, or act in any other capacity with regard to the ADEA. Second, assuming the EEOC has power to investigate age discrimination, defendant contends that the subpoena should not be enforced because the information sought thereby is not reasonably related to any purpose of the ADEA.

To properly understand defendant's first argument, it is necessary to examine the underlying legislation.

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[1] 29 U.S.C. §626(a) provides:

> The Secretary [now the EEOC] shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

28 U.S.C. §209 provides:

> For purposes of any investigation provided for in this Act, the provisions of Sections 49 and 50 of Title 15 (relating to the attendance of witnesses and production of books, papers and documents) ... are hereby made applicable to the jurisdiction and powers and duties of the Secretary of Labor and the industries committees.

Finally, 15 U.S.C. §49 provides in pertinent part:

> [T]he Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation.

The original enactment of the ADEA vested the statutory responsiblity for administration and enforcement of its provisions in the Secretary of Labor. This responsibility was transferred from the Secretary of Labor to the EEOC by Reorganization Plan No. 1 of 1978, Section 2. Reorganization Plan No. 1 was enacted pursuant to the procedures set forth in the Reorganization Act of 1977, 5 U.S.C. §901 *et seq.* ("Reorganization Act"). The Reorganization Act gave the President of the United Stattes authority to restructure and reorganize the executive branch and its agencies. 5 U.S.C. §§901, 903. The President was empowered to prepare reorganization plans and submit such plans to both Houses of Congress. 5 U.S.C. §903. If during a period of sixty days after a plan was transmitted to Congress neither House passed "a resolution stating in substance that the House does not favor the reorganization plan," the reorganization plan then became effective. 5 U.S.C. §906(a).

Pursuant to these procedures, President Carter prepared Reorganization Plan No. 1 and submitted the plan to Congress. Neither House of Congress passed a resolution objecting to the plan within the requisite sixty-day period. Consequently, Reorganization Plan No. 1 became "effective" on January 1, 1979, and was published in the statutes at large and the Federal Register pursuant to 5 U.S.C. §906(d).

Defendant contends that the process under which Reorganization Plan No. 1 became effective is unconstitutional under the recent Supreme Court decision in *Immigration and Naturalization Service v. Chadha,* ____ U.S. ____, 103 S.Ct. 2764 (1983).

In *Chadha,* the Supreme Court held unconstitutional a provision in the Immigration and Nationality Act which authorized one House of Congress, by resolution, to invalidate a decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow

a particular deportable alien to remain in the United States. 103 S.Ct. at 2788. The Court based its decision on the bicameralism and presentment requirements of Article I of the United States Constitution and its finding that the "one-house veto" exercised by the House of Representatives was the kind of action to which the procedural requirements of Article I apply. 103 S.Ct. 2780-2788.

Defendant asserts that the one-house veto provision contained in the Reorganization Act is equally unconstitutional, that it is not severable from the remainder of the Act, that Congress has not "ratified" the transfer of ADEA enforcement power from the Labor Department to the EEOC, and that the Act is therefore unconstitutional in its entirety. From these assertions, defendant contends that the transfer of authority to administer and enforce the ADEA from the Secretary of Labor to the EEOC must be deemed invalid and that such authority therefore remains with the Secretary of Labor. Because the EEOC and not the Secretary of Labor is seeking to enforce the subpoena at issue, defendant concludes that it is not legally required to produce the materials requested by the subpoena.

Several courts have recently considered the issues raised by respondent. The clear majority of courts have found that the EEOC presently has authority to administer and enforce the ADEA notwithstanding the Supreme Court's holding in *Chadha. See, e.g., EEOC v. Hernando Bank, Inc.,* 724 F.2d 1188 (5th Cir. 1984); *EEOC v. Ingersoll Johnson Steel Co.,* No. 1P83-269-C, slip op. (S.D.Ind. April 5, 1984); *Holecek v. Lincoln St. Louis,* No. 83-0721 C(5), slip op. (E.D.Mo. March 27, 1984); *EEOC v. A.N.R. Pipeline Company,* No. 82-0626, slip op. (W.D.La. March 19, 1984); *EEOC v. County of Hudson,* No. 83-1669(D), slip op. (D.N.J. March 16, 1984); *EEOC v. Plessey, Inc.,* No. 79-1383, slip op. (D.Kan. March 12, 1984); *EEOC v. City of Waco, Texas,* No. W-82-CA-11, slip op. (W.D.Tex. March 5, 1984; *EEOC v. Old Dominion Freight Line, Inc.,* 34 FEP Cases 377 (M.D.N.C. March 7, 1983);

EEOC v. Pan American Airways, 34 FEP Cases 321 (N.D.Cal. March 6, 1984); *EEOC v. Fairfax County,* No. 84-83-A, slip. op. (E.D.Va. March 2, 1984); *EEOC v. International Mill Service,* 34 FEP Cases 392 (E.D.Pa. Feb. 22, 1984); *EEOC v. Radio Montgomery, Inc.,* 34 FEP Cases 378 (W.D.Va. Feb. 22, 1984); *EEOC v. State of New York,* 34 FEP Cases 379 (N.D.N.Y. Jan. 31, 1984); *EEOC v. Chrysler Corp.,* 33 FEP Cases 1838 (E.D.Mich. Jan. 24, 1984); *EEOC v. CBS, Inc.,* 34 FEP Cases 257 (S.D.N.Y. Jan. 13, 1984), *appeal docketed* (2d Cir. No. 84-6063, Feb. 28, 1984); *EEOC v. City of Memphis,* 33 FEP Cases 1089 (W.D.Tenn. Dec. 29, 1984); *EEOC v. Cudahy Foods Co.,* 33 FEP Cases 1836 (W.D.Wash. Dec. 28, 1983); *EEOC v. Jackson County,* 33 FEP Cases 963 (W.D.Mo. Dec. 13, 1983); *Muller Optical Company v. EEOC,* 574 F.Supp. 946 (W.D.Tenn. 1983). *But see EEOC v. Martin Industries,* 34 FEP Cases 201 (N.D.Ala. March 5, 1984); *EEOC v. Westinghouse Electric Corp.,* 33 FEP Cases 1232 (W.D.Pa. Jan. 5, 1984), *appeal docketed* (3d Cir., No. 84-3073, Feb. 9, 1984); *EEOC v. Allstate Ins. Co.,* 570 F.Supp. 1224 (S.D.Miss. 1983), *notice of appeal filed* (11th Cir. March 21, 1984).

After careful consideration of the above-cited cases, the parties' briefs, and the applicable law, this Court concludes that Congress has ratified the President's transfer of authority to administer and enforce the ADEA from the Secretary of Labor to the EEOC. *Accord Holecek v. Lincoln St. Louis, supra.* Therefore, the Court finds that the EEOC has power to administer and enforce the ADEA. In making this conclusion, the Court concurs with and incorporates the sound reasoning of *Muller Optical Co. v. EEOC,* 574 F.Supp. at 953-54, on the ratification issue. Specifically, the Court relies on the conclusion in *Muller Optical* that this issue is controlled by *Isbrandtsen-Moller Co. v. United States,* 300 U.S. 139 (1937). *See also Fleming v: Mohawk Co.,* 331 U.S. 111, 118-19 (1947); *Ex parte Endo,* 323 U.S. 283, 303 n. 24 (1944); *Swayne v. Hoyt, Ltd.,* 300 U.S. 297, 301-02 (1937). Respondent's contention that *TVA v. Hill,* 437 U.S. 153 (1978), undercuts *Isbrandtsen-*

Moller is without merit as *Hill* addresses the much stricter standard for "implied repeal" rather than the law of ratification. *See EEOC v. Ingersoll Johnson Steel Co.*, No. 1P83-269-C, slip op. at 16-17 (S.D.Ind. April 5, 1984) (stating that *TVA v. Hill* is inapplicable in ratification cases). The Court's ruling on ratification makes it unnecessary to consider respondent's remaining arguments premised on *Chadha*.

Respondent's argument that the subpoena should not be enforced because the information sought is not reasonably related to any purpose of the ADEA is equally without merit.

The primary purpose of the ADEA is to prohibit employment discrimination by an employer against an employee or prospective employee on the basis of age. *See* 29 U.S.C. §623(a). The subpoena issued by the EEOC to respondent requests two classes of information:

> 1. Records, notes, correspondence, and all writings or [sic] any kind which describe, explain, relate to, or in any way bear upon the relationship of members to the firm and members vis-a-vis members, to include, but not limited to, agreements and codicils, if any, which relate to the period from January 1, 1978, through the present inclusive.
>
> 2. Documents, writings, correspondence, and other records which describe, explain, or relate in any way to the policy(ies) and practice(s) by which retirement is or has been effected during the period January 1, 1978, through the present, inclusive.

Respondent argues that the subpoena issued by the EEOC is not reasonably related to the ADEA because it seeks information concerning possible discrimination against partners. Partners in an accounting firm, respondent contends, are not "employees" protected by the provisions of the ADEA.

The EEOC contends that the subpoena was issued to gather information to enable it to determine whether members (part-

ners) of respondent's firm ought to be treated as "employees" under the ADEA and, if so, whether respondent's practices with respect to the retirement of those persons violate the ADEA.

The question of whether partners in a partnership can be construed to be "employees" under the ADEA has not been decided by any court. The Court is aware that the Seventh and Eleventh Circuits have ruled that under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, partners are not "employees" within the meaning of that Act. *See Burke v. Friedman,* 556 F.2d 867 (7th Cir. 1977); *Hishon v. King & Spaulding,* 678 F.2d 1022 (11th Cir. 1982), *rev'd on other grounds,* ____ U.S. ____, 52 U.S.L.W. 4627 (1984). Additionally, Justice Powell, in his concurrence in the Supreme Court's decision in *Hishon v. King & Spaulding, supra,* expressed his view that Title VII should not be extended to apply to the management of a law firm by its partners. 52 U.S.L.W. at 4630.

Burke and *Hishon,* however, were not subpoena enforcement cases. Generally, a party to whom a subpoena is issued under the ADEA may not object on the ground that the matters investigated are outside the exact coverage of the ADEA. *EEOC v. Allstate Insurance Co.,* 30 FEP Cases 573, 575 (N.D.Ill. 1981), *citing EEOC v. Institute of Gas Technology,* 23 FEP Cases 825 (N.D.Ill. 1980). As long as information sought "may be" relevant to a legitimate purpose, the subpoena should be enforced. *See United States v. Powell,* 379 U.S. 48, 57 (1964).

The EEOC contends that the information sought may be relevant to a legitimate purpose because it is possible that respondent may label some of its members as "partners" when, in fact, those members may not fit within the traditional definition of the term. The Court concurs with the EEOC's position. *See Hishon v. King & Spaulding,* 52 U.S.L.W. at 4630 n.2 (Powell, J. concurring) ("[A]n employer may not evade the strictures of Title VII simply by labeling its employees as "partners.")

In conclusion, the Court finds that the EEOC has authority to issue subpoenas under the ADEA and that the subpoena at issue in this case seeks information reasonably related to a legitimate purpose. Because respondent has asserted that some of the documents requested may be confidential in nature, the Court will grant respondent ten days to file a motion for an appropriate protective order. Otherwise, respondent shall comply with the subpoena and produce the requested documents.

Dated this 20th day of June, 1984.

/s/ Edward L. Filippine
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2277 C (2)

Equal Employment Opportunity Commission,
Applicant,

vs.

Peat, Marwick, Mitchell & Co.,
Respondent.

MEMORANDUM

This matter is before the Court on respondent's motion to stay order enforcing subpoena pending appeal. Respondent filed a memorandum in support of its motion and applicant in opposition thereto.

On June 20, 1984, this Court entered the following Order in the above-styled cause:

> IT IS HEREBY ORDERED that respondent be and is granted 10 days from the date of this Order in which to file a motion for an appropriate protective order concerning confidential documents; otherwise, respondent shall produce within 10 days of the date of this Order all documents requested in the subpoena issued to it by the Equal Employment Opportunity Commission.

On June 25, 1984, respondent filed a notice of appeal, the instant motion for a stay order, and a memorandum in support of its motion.

Rule 62(c), Fed.R.Civ.P. provides in pertinent part:

> (c) **Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolv-

> ing, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Generally, in order to prevail on its motion for a stay pending appeal, defendant must make:

(1) a strong showing that it is likey to succeed on the merits of the appeal;

(2) a showing that, unless the stay is granted, it will suffer irreparable injury;

(3) a showing that no substantial harm will come to other interested parties; and

(4) a showing that a stay will do no harm to the pubic interest.

Reserve Mining Company v. United States, 498 F.2d 1073, 1076-77 (1974); 1 Wright & Miller, *Federal Practice and Procedure* § 2904 at p. 316. *See also Liddell v. State of Missouri,* 717 F.2d 1180, 1182 (8th Cir. 1983).

As to the first factor, it is understandable that any trial judge would be reluctant to find that there is substantial likelihood that he will be reversed on appeal. As a result, courts, including courts in this district, have granted stays to preserve the status quo when they have ruled on admittedly difficult legal questions and when the equities of the case suggest that the status quo should be maintained. *See Sweeney v. Bond,* 519 F.Supp. 124, 132 (E.D.Mo. 1981), *judgment affirmed,* 669 F.2d 542 (8th Cir.), *cert. denied,* ____ U.S. ____, 103 S.Ct. 174 (1982). *See also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841, 844 (D.C. Cir. 1977); *Shell Oil Company v. Equal Employment Opportunity Commission,* No. 80-1202 C(5) (E.D.Mo. Nov. 9, 1981).

Under this standard the Court finds that a stay should be granted in this case. First, a stay in this case clearly would preserve the status quo. Second, the legal questions presented in this case are complex and have divided the courts which have addressed them. Third, respondent may suffer irreparable harm if a stay is not granted. It would be required to produce documents that are highly confidential in nature. Such disclosure could result in irreparable injury to respondent's business. Fourth, it appears that no substantial harm would result to the EEOC or to the public if the stay were granted. Although the EEOC's investigation of respondent would be delayed somewhat by a stay, the Court finds this harm to be insubstantial when compared to the potential irreparable harm that respondent would suffer if the stay was not granted.

For all these reasons, the Court will grant respondent's motion for a stay pending appeal. Additionally, given the nature of this action, the Court believes no bond is necessary to protect the rights of the EEOC.

Dated this 9th day of July, 1984.

/s/ Edward L. Filippine
United States District Judge

APPENDIX E

Statutes Involved

Age Discrimination in Employment Act 29 U.S.C. §§621-634

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arb itrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and Research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise

adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that any employee aged 65 through 69, and any employee's spouse aged 65 through 69, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g)[1] Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary to appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the

performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of

dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and

Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life

annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

§ 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of

sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment

shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

29 U.S.C. § 209

§ 209. Attendance of witnesses

For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

29 U.S.C. § 211

§ 211. Investigations, inspections, records, and homework regulations

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and to the wages, hours and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as

necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohbiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

15 U.S.C. § 49

§ 49. Documentary evidence; depositions; witnesses

For the purposes of sections 41 to 46 and 47 to 58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinabove provided.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

15 U.S.C. § 50

§ 50. Offenses and penalties

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce any documentary evidence, if in his power to do so, in obedience to an order of a district court of the United States directing compliance with the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under sections 41 to 46 and 47 to 58 of this title, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any person, partnership, or corporation subject to said sections, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such person, partnership, or corporation or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such person, partnership, or corporation or who shall willfully refuse to submit to the Commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such person, partnership, or corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any persons, partnership, or corporation required by sections 41 to 46 and 47 to 58 of this title to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.